In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1298

NICK MICHAEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the co-conspirator exception to the hearsay rule violates the Sixth Amendment and that there was insufficient evidence that petitioner participated in the conspiracy.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring maliciously to destroy by means of an explosive property used in interstate commerce, and of the substantive offense, in violation of 18 U.S.C. 2, 371, and 844(i).[1] He was sentenced to concurrent terms of five and seven years' imprisonment. The court of appeals affirmed (Pet. App. A).

[1]Co-defendant Franklin D. Golden was convicted of the same charges. Golden was sentenced to concurrent terms of five years' imprisonment. He did not appeal his conviction and is not a party to this petition.

1. The evidence introduced at trial (now taken, together with all legitimate inferences, in the light most favorable to the government) showed that the entire stock of Jupiter Mills, which produced double knit cloth on a contract or commission basis, was owned by petitioner, his wife, and their two children (Tr. 666-671). Jupiter Mills lost $32,138 in the fiscal year ending October 31, 1972 (Tr. 25). Between July and August 1972, eight knitting machines were delivered to Jupiter Mills (Tr. 54). However, by July 1973 only two of the machines had been paid for.

On November 2, 1972, Jupiter Mills increased the insurance coverage on its machinery and the other contents of its buildings from $470,000 to $1,000,000. The insurance coverage on its buildings was also increased to $250,000 (Tr. 73).

In April 1973, Franklin D. Golden, a former employee of Jupiter Mills, told Walter Elliott that petitioner wanted his "place" blown up. According to Golden, petitioner agreed to pay $5,000 for the job. Elliott agreed to help Golden perform this job in return for half of the $5,000 (Tr. 315-316, 677). Golden told Elliott that the plan was to destroy a wall so that a portion of the concrete roof would collapse onto certain machines, but that another part of the plant was not to be destroyed because petitioner wanted to use the yarn that was stored there (Tr. 317).

Later, Golden told Elliott that petitioner had telephoned from Greece and had instructed them to delay the plan because petitioner wanted to fill some orders (Tr. 321-322). On April 2, petitioner telephoned Jupiter Mills and asked to speak with Golden, who could not be reached. Petitioner then asked that Golden be at the office at noon on the following day. On April 3, petitioner again telephoned and spoke with Golden (Tr. 402-404, 691-693).

In late May or early June 1973, Golden told Ralph Cobb that petitioner wanted Jupiter Mills blown up. Golden advised Cobb that he would receive $2,500 if he obtained some dynamite (Tr. 145-146). Several days later, Cobb gave Golden seven sticks of dynamite. Golden told Cobb, two or three days later, that petitioner had said that more dynamite was needed (Tr. 146-147). Cobb then acquired an additional ten sticks of dynamite (Tr. 147-148).

On about July 13, 1973, petitioner had his car serviced at a gas station where Golden and Cobb worked. After servicing petitioner's car, Golden told Cobb that petitioner had told him to blow up the plant whenever he was ready (Tr. 137, 149-152). Golden also showed Cobb a set of keys for Jupiter Mills, which he claimed petitioner had given him (Tr. 152). The following day, Golden and Cobb set off the dynamite, destroying a wall at Jupiter Mills and causing a portion of the roof to collapse onto a number of knitting machines (Tr. 155-157, 470-473). At the time of the explosion, six of the new machines were still not paid for (Tr. 62-63).

The day after the explosion, Cobb observed petitioner speaking with Golden for about ten or fifteen minutes. When petitioner left, Golden told Cobb that petitioner had said that they had done a "damn good job" (Tr. 159). Golden gave Cobb $1,031 for his part in the affair, explaining that petitioner had provided the money (Tr. 193).

2. Petitioner argues that there was not sufficient non-hearsay evidence connecting him to the conspiracy and, therefore, that it was error for the district court to allow the jury to consider the hearsay declarations of others.

There is, at least verbally, a conflict among the circuits concerning the quantum of nonhearsay evidence linking an accused to a conspiracy that must be introduced before the jury may be permitted to consider hearsay declarations. The Second and Third Circuits hold that hearsay may be considered if a "fair preponderance" of the nonhearsay evidence indicates membership in the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028; *United States* v. *Bey*, 437 F.2d 188 (C.A. 3). Other courts of appeals have held or intimated that the nonhearsay evidence of participation in the conspiracy must by itself be sufficient to allow a case to go to the jury before hearsay may be considered against a defendant. See *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Morton*, 483 F.2d 573, 576 (C.A. 8); *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8). Cf. *United States* v. *Nixon*, 418 U.S. 683, 701, n. 14. Still other circuits are undecided.[2]

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[2]Compare *Carbo* v. *United States*, 314 F.2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953, with *United States* v. *Spanos*, 462 F.2d 1012 (C.A. 9). A panel of the Fifth Circuit has held that the nonhearsay evidence should be sufficient to permit the case to the jury. *United States* v. *Oliva*, 497 F.2d 130, 132-133. But in a recent *en banc* case the court held that, at least for purposes of *habeas corpus* to review a state conviction, all that is required is "independent evidence of a concert of action" establishing a "likelihood" of participation in the conspiracy (*Park* v. *Huff*, 506 F.2d 849, 859). *Park* did not refer to *Oliva*. The Fourth Circuit previously had held that there must be "prima facie proof of the conspiracy" (*United States* v. *Vaught*, 485 F.2d 320, 323), without specifying whether that proof must be convincing beyond a reasonable doubt or only by a preponderance of the evidence. See also *United States* v. *Hoffa*, 349 F.2d 20, 41 (C.A. 6), affirmed on other grounds, 385 U.S. 293; *United States* v. *Santos*, 385 F.2d 43, 45 (C.A. 7).

It may be that this conflict is illusory, and that the courts of appeals decide cases consistently in spite of their verbal differences. There is, in any event, no need for the Court to decide in this case whether it is necessary to undertake to resolve the conflict. The court of appeals here concluded that there was "evidence sufficient to permit the jury to find beyond a reasonable doubt that [petitioner] joined the conspiracy to blow up Jupiter Mills, and that as a consequence the hearsay statements * * * were admissible" (Pet. App. 17). The court of appeals apparently applied—and found that the evidence satisfied—the most rigorous standard.

Nonhearsay evidence in the record shows that petitioner increased the insurance coverage on his machines five months before Golden and Cobb began their roles in the conspiracy to blow up those machines (Tr. 73, 315-317), that petitioner telephoned Golden at the approximate time Golden told Cobb that petitioner had instructed them to postpone the plan to dynamite a portion of Jupiter Mills (Tr. 321-322, 403), and that petitioner spoke with Golden just before Golden told Cobb that petitioner had instructed them to carry out the plan whenever they were ready (Tr. 155-158). Nonhearsay evidence also demonstrated that after the explosion, petitioner and Golden spoke to each other just before Golden told Cobb that petitioner had said that they had done a "damn good job" (Tr. 159). This evidence, when combined with evidence that Jupiter Mills was losing money, established both a motive for participation in the conspiracy and some degree of concert among petitioner, Golden and Cobb. Under established standards, this was sufficient circumstantial evidence to permit the jury to infer that petitioner was a

member of the conspiracy. See *United States* v. *Pennett*, 496 F.2d 293, 295-296 (C.A. 10); *United States* v. *Moraites*, 456 F.2d 435 (C.A. 3); *United States* v. *Perillo*, 164 F.2d 645 (C.A. 2).[3]

3. Petitioner argues that the co-conspirator exception to the hearsay rule prevented him from confronting and cross-examining the witnesses against him and therefore violates the Sixth Amendment. The argument is unavailing. *Dutton* v. *Evans*, 400 U.S. 74, 77-78, 88-90, held that the right to confront and cross-examine was not violated by a Georgia co-conspirator exception that allowed into evidence a co-conspirator's out-of-court statement made during the concealment phase of the conspiracy. *A fortiori*, the federal co-conspirator exception, which allows into evidence only statements during the active phase of the conspiracy, is constitutional. Cf. *United States* v. *Nixon*, *supra; Lutwak* v. *United States*, 344 U.S. 604, 617.

4. Petitioner finally contends that Golden's statements lacked the indications of trustworthiness relied upon in *Dutton*. But Golden's statements had sufficient indicia of trustworthiness. It was against Golden's penal interest to state that petitioner wanted his machinery destroyed and that he was willing to pay $5,000 for the job; these statements tended to establish Golden's purpose and motive in joining the conspiracy (Tr. 145-146, 155-158, 315-316). Golden was directly implicated in the conspiracy by his out-of-court statements that petitioner had said that more dynamite was needed, that petitioner had given him keys to the plant, that petitioner wanted Golden to postpone the explosion, and that petitioner had told him he had done a good job (Tr. 146-147, 152, 159, 321-322).

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[3]Petitioner asserts that there is a similarity between the facts in the instant case and those in *Park* v. *Huff*, 493 F.2d 923 (C.A. 5), reversed following rehearing *en banc*, 506 F.2d 849, petition for writ of certiorari pending, No. 74-1266. *Park* held that there was sufficient independent circumstantial evidence to invoke the Georgia co-conspirator exception to the hearsay rule (506 F.2d at 858-859). The court also held that the co-conspirator exception did not violate the right to confrontation (506 F.2d at 861). Accordingly, *Park* supports the decision of the court below.

Moreover, Golden spoke from personal knowledge about what petitioner had told him, and it is thus less likely that Golden's statements were subject to faulty recollection. See Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957 (1974). Golden had no motive to lie when he told Cobb that petitioner was pleased with their performance. Petitioner argues that Golden had a motive to lie when he initially told Cobb and Elliott that petitioner wanted his building dynamited, because petitioner's participation might persuade them to join in the conspiracy. But there is no basis in the record to suggest that Golden had his own reasons for dynamiting a portion of Jupiter Mills. It is therefore pure speculation that Golden had this, or any other, motive to lie. The jury was instructed, properly, that it must evaluate Golden's memory and credibility. It did so, and it did not find them wanting. Petitioner has had a fair trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.